NO. 46956-1-II

COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

SAINT-GOBAIN CONTAINERS, INC.

Appellant,

v.

LLOYD HARA, King County Assessor,

Respondent.

ON APPEAL FROM THURSTON COUNTY SUPERIOR COURT
(Hon. Carol Murphy)

APPELLANT'S OPENING BRIEF

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I. ASSIGNMENTS OF ERROR

This is an appeal of an agency decision subject to judicial review under the Administrative Procedure Act ("APA"), chapter 34.05 RCW. The agency at issue here is the Board of Tax Appeals ("BTA" or "Board"). The BTA erred in deciding Saint-Gobain's property tax appeals by failing to follow (1) its own rules on admissibility of evidence; (2) the statutory requirement to make adjustments to sales that occurred at the peak of the market; (3) legal requirements on appraisal treatment of environmental issues; and (4) the requirements under case law, statute, regulation, and the BTA's prior holdings to lower Saint-Gobain's standard of proof to a preponderance of the evidence.

II. STATEMENT OF ISSUES

The APA, at RCW 34.05.570(3), provides for relief from an agency decision on a number of grounds, including where an agency has erroneously interpreted or applied the law, issued a decision inconsistent with the agency's own rules, failed to decide all the issues before it, issued a decision not supported by evidence that is substantial when viewed in light of the whole record, or made a decision that is arbitrary or capricious. The questions before the Court in this case are matters of law: In deciding Saint-Gobain's property tax appeals, did the BTA correctly interpret the requirements under case law, statutes, and regulations, including its own rules? Did the BTA decide all the issues before it?

III. STATEMENT OF THE CASE

A. The Subject Land.

During the 2010 and 2011 assessment years at issue in this case, Saint-Gobain Containers, Inc. ("Saint-Gobain") owned a glass-bottle manufacturing and warehouse facility at 5801 East Marginal Way South in Seattle. Administrative Record ("AR") 93, 96-97 (Transcript), 614 (Ex. A2-032). Situated between Marginal Way and the Duwamish River, the facility lies on a rectangle of land that features a small rail spur and a leased alley. AR 93 (Transcript), 614, 640 (Ex. A2-032, -058). Two triangular areas form the rectangular unit: a twelve-acre parcel that Saint-Gobain owned (the "subject land"), and an adjacent area of nearly equal size that it leased from King County. AR 93 (Transcript), 614, 640 (Ex. A2-032, -058). The parties agree that the facility is a single economic unit. AR 94 (Transcript), 923 (Ex. A10-1), 944 (Ex. A11-1).

B. The Procedural History.

Saint-Gobain appealed the 2010 and 2011 property tax assessments to the county board of equalization ("BOE"). At issue was the value of the land. AR 27 (BTA Decision). The Assessor appraised the subject land at $31 per square foot. AR 28 (BTA Decision). Saint-Gobain's expert appraised it at $23 per square foot. *Id.* For the 2010 assessment, the BOE ordered a reduction to approximately $24 per square foot, and the Assessor appealed to the BTA. AR 1086-1087 (Notice of Appeal). For the

2011 assessment, the BOE sustained the assessed value, and Saint-Gobain appealed to the BTA. AR 1078-1081 (Notice of Appeal). For both these appeals Saint-Gobain elected formal proceedings, which are subject to judicial review under the APA. WAC 456-09-010(1)(a); AR 27 (BTA Decision). The BTA consolidated these two appeals, along with an earlier one not subject to judicial review, in a single evidentiary hearing. AR 27 (BTA Decision). After the hearing, the BTA issued its findings of fact and conclusions of law affirming the assessed values. *Id.* Saint-Gobain petitioned for judicial review. Clerk's Papers ("CP") 4-7. The Thurston County Superior Court affirmed the BTA's decision. Saint-Gobain now appeals that decision to this Court.

C. The Record Under Review.

Under the APA, this Court reviews the decision of the agency, not that of the superior court. *Tapper v. State Employment Security Department*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993). The BTA's record consists of a Bates-numbered copy of the BTA's entire file, including the decisions of and evidence submitted to the BOE (AR 1092-1370),[1] a transcript of the BTA's evidentiary hearing (AR 44-261), evidence submitted to the BTA (AR 303-392, 472-1063), and the BTA's decision (AR 25-38, also at CP 10-22). At the evidentiary hearing,

[1] The BTA's certified administrative record includes only the 2009 BOE file; it appears to be missing the 2010 and 2011 BOE files. Exhibits A10 and A11 (AR 923-64) are the Assessor's submissions to the BOE for 2010 and 2011.

Saint-Gobain presented thirteen exhibits, the testimony of its tax director, Jeff Shonkwiler, and the testimony of its appraiser, Joseph Creech, whose appraisal reports are the first two of Saint-Gobain's exhibits (AR 475-682).The Assessor presented six exhibits and the testimony of appraiser Bruce Zelk for the 2010 and 2011 assessments (AR 326, 966-1061). The BTA requested post-hearing evidence to clarify one of the Assessor's exhibits, resulting in the Assessor's submission of one additional exhibit (AR 318-325). The BTA invited a response from Saint-Gobain, resulting in Saint-Gobain's submission of two additional exhibits (AR 303-316). The BTA also issued an order (AR 39-42) granting the Assessor's motion to exclude exhibits and testimony related to additional appraisals, as discussed below.

D. The Evidence.

Both parties relied primarily on the sales comparison approach to value the subject land. The Assessor's appraiser, Mr. Zelk, based his $31-per-square-foot value of the subject land on four comparable sales, all from 2006 and 2007. AR 998-1000 (Ex. R2-7 to -9), 1024-26 (Ex. R3-7 to -9). He concluded that the four properties had sales prices of $25 to $38 per square foot of land. *Id.*

Saint-Gobain's appraiser, Mr. Creech, used six comparables: two sales from 2008, two sales from 2009, and two openly marketed listings as of each of the valuation dates. AR 543 (Ex. A1-069), 631 (Ex. A2-049).

Noting that the earlier sales "occurred in a time of superior market conditions," Mr. Creech made qualitative adjustments to account for the decline in the real estate values since late 2008. AR 542 (Ex. A1-068), 630 (Ex. A2-048). He also considered the land Saint-Gobain leased from the County as a comparable and used the ground lease as an alternate method of valuing the subject land. AR 552 (Ex. A1-078), 640 (Ex. A2-058). Relying on the sales comparison approach, he concluded a value of $23 per square foot for the subject land. AR 553 (Ex. A1-079), 642 (Ex. A2-060).

Saint-Gobain submitted as additional evidence (1) two appraisal reports of the leased land underlying the other half of Saint-Gobain's facility (AR 683-814 (Exs. A3 and A4)), and (2) Mr. Zelk's contemporaneous appraisals of the property he selected as comparable sales (AR 815-913 (Exs. A5 to A8)). For one of the appraisals of the leased land, King County engaged James A. Greenleaf, MAI, of McKee & Schalka, for an independent appraisal to assist the County in determining market rent. AR 705-814 (Ex. A4). The second appraisal was submitted to the Assessor by the state Department of Revenue as part of its duty under RCW 84.48.075 to determine the accuracy of the Assessor's valuations. AR 683-704 (Ex. A3). Using many of the same comparables as the Assessor used for the subject land, the appraisals concluded land values of $19 and $22 per square foot, respectively. AR 759 (Ex. A4), 687 (Ex. A3).

Regarding Mr. Zelk's appraisals of the properties he selected as comparable, Mr. Zelk concluded land values at $19 to $23 per square foot. AR 815-913 (Exs. A5 to A8). The Assessor moved to exclude this additional evidence, and the BTA granted his motion. AR 39-43.

IV. STANDARD OF REVIEW

Judicial review of a final administrative decision is governed by the APA, chapter 34.05 RCW. *Chandler v. Office of Ins. Comm'r*, 141 Wn. App. 639, 647, 173 P.3d 275 (2007), *review denied*, 163 Wn.2d 1056 (2008). Questions of law and questions of correctly applying the law to the facts are subject to *de novo* judicial review under the APA. *Tapper*, 122 Wn.2d at 403. Where the law is unambiguous, courts do not defer to the agency. *Boeing Co. v. Gelman*, 102 Wn. App. 862, 866, 872, 10 P.3d 475 (2000). Courts "have the ultimate authority to interpret a statute, and no deference is due to an agency's interpretation if it conflicts with a statutory mandate." *Mynatt v. Gordon Trucking, Inc.*, 183 Wn. App. 253, 260, 333 P.3d 442 (2014). Likewise, courts do not defer to the BTA when its interpretations have been inconsistent. *Glen Park Associates, LLC v. Department of Revenue*, 119 Wn. App. 481, 492, 82 P.3d 664 (2003); *Western Ag Land Partners v. Department of Revenue*, 43 Wn. App. 167, 171, 716 P.2d 310 (1986).

Here, because the law is both unambiguous and the BTA's interpretations have been inconsistent, the *de novo* standard without

deference applies. First, with respect to the statutory directive to make adjustments for market conditions, the BTA has repeatedly favored adjusting peak-market sales for subsequent recessionary conditions. *See, e.g., Diamond Parking–Empire Industrial Park v. Portmann*, BTA Docket Nos. 78185-78190 (2014) (finding fault in the failure to adjust for market conditions for sales that "occurred prior to the downturn in the economy"); *PC Frontier Village SC, LLC v. Portmann*, BTA Docket Nos. 11-068 to -074 and 13-010 to -016 at pp. 5-7 (2013) (explaining that sales from 2006 and 2007 "are not considered comparable because of the timing of the sales" in light of the enormity of the market decline); *O'Hare Cottage Woods, LLC v. Hara*, BTA Docket No. 79683, 79684 at n.1 (2014) (noting that the "onset of the 'Great Recession' . . . can fairly be described as immediate and devastating"). One recent BTA decision strongly stated that failing to adjust sales for market conditions is erroneous because "[f]actors that influence value *change constantly*" (citing an Appraisal Institute text to that effect). *Foldesi v. Lonergan*, BTA Docket Nos. 81435-36, 81438 (2014) (emphasis added).

Second, with respect to environmental influences, Washington case law and past BTA decisions hold that environmental costs only qualify for a deduction when there is "a reasonably certain estimate of the costs of cleanup, including a formal plan and timetable." *Weyerhaeuser Co. v. Easter*, 126 Wn.2d 370, 384-85, 894 P.2d 1290 (1995). Failure to

apply case law precedent and statutory requirements means no deference is due to the BTA. Inconsistency in the BTA's decisions on both these points likewise merits no deference.

The same *de novo* standard applies to determining whether an agency followed its own rules. Agencies must follow their own rules; failure to do so is grounds for reversal. RCW 34.05.570(3)(h). *See, e.g.*, *Boeing*, 102 Wn. App. at 868 (summarily reversing a decision in which the BTA failed to follow its own procedural rules). Thus *de novo* review with no deference to the BTA applies to this Court's review of the legal errors in the BTA's decision.

V. ARGUMENT

The BTA's decision contains a number of errors, each of which suffices as grounds for reversal.

A. The BTA excluded evidence without regard to its own rules on admissibility of evidence and without addressing Saint-Gobain's purposes for presenting the evidence.

Administrative hearings proceed under significantly relaxed rules of evidence. *Ingram v. Department of Licensing*, 162 Wash.2d 514, 524, 173 P.3d 259 (2007); *Goldsmith v. Department of Social & Health Services*, 169 Wn. App. 573, 585, 280 P.3d 1173 (2012). Under the APA and the BTA's rules, evidence is admissible if it is "the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs." RCW 34.05.452(1); WAC 456-09-755(1). The

Board must construe this rule liberally. *Multicare Medical Center v. Department of Revenue*, BTA Docket No. 01-150 (2005). Here, the BTA did not address this prudent-person standard when it excluded evidence presented by Saint-Gobain. In failing to analyze each item of excluded evidence against this standard, or even to cite or otherwise show any awareness of its own rule on admissibility of evidence, the BTA committed a reversible error.

The BTA ignored another important factor in excluding this evidence: the purposes for which Saint-Gobain presented the evidence. The purposes were two-fold. First, with regard to the two appraisal reports of the land underlying the other half of Saint-Gobain's facility, the appraisals had been performed for and relied upon by the County for other purposes. These appraisals concluded land values of $19 to $22 per square foot. But for property tax purposes, the Assessor appraised both triangles of the land underlying the facility identically at $31 per square foot. This demonstrates the County's inconsistent valuations of the same land for similar valuation dates. This inexplicable difference is relevant.

Second, the purpose of presenting Mr. Zelk's appraisals of the properties he selected as comparable was to impeach him on cross-examination. An expert who concludes two different values for the same property for the same valuation date should not be able to escape being confronted with that fact. In appraising the subject land, Mr. Zelk

concluded land values of $25 to $38 for the comparables, with no adjustments for changed market conditions between the sale dates and the valuation dates. But for the same valuation dates, he concluded land values at $19 to $23 per square foot for the purpose of appraising those properties for property taxes. As with the County's appraisal reports, the evidence is relevant: It casts doubt on the credibility of the Assessor and his expert witness with respect to (1) Mr. Zelk's valuation of the subject land, and (2) his refusal to make adjustments to the sale prices of the comparables for the subsequent decline in market conditions.

Saint-Gobain explained these purposes for presenting the evidence in written response to the Assessor's motion and in oral argument. AR 57-62 (Transcript), 415-422. But the BTA entirely ignored Saint-Gobain's stated purposes for presenting the evidence. The BTA instead treated the evidence as though the purpose were to directly demonstrate the value of the subject land—an entirely different purpose. AR 41 (BTA Order). The BTA also incorrectly applied the statutory valuation criteria (RCW 84.40.030) as though they limited the universe of relevant evidence. *Id.* The BTA ignored the prudent-person standard in its own rule. Nor did it look to the standard for judging evidence in a court. Under ER 401, the low threshold for relevant evidence is that it have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the

evidence." Evidence of the County's inconsistent appraisals passes both tests for relevancy. Failure to consider (1) the issues raised by Saint-Gobain in response to the Assessor's motion and (2) the applicable standard for admissibility of evidence are each questions of law that warrant reversal of the BTA's decision.

An additional reason to admit the two County appraisal reports is the fact that the BOE had already admitted them, considered them, and included a reference to them in one of its orders. AR 423-25. Both appraisals, therefore, already form part of the record in this case. RCW 84.08.130(1) ("The board of tax appeals shall require the board appealed from to file a true and correct copy of its decision in such action and all evidence taken in connection therewith, and may receive further evidence, and shall make such order as in its judgment is just and proper."); WAC 456-09-010(1)(a) ("In appeals from a decision of a board of equalization, the record includes the decision of that board together with the evidence submitted thereto."). The BOE's consideration of the appraisals supports their admissibility under the prudent-person standard.

The BTA mentions its exclusion of this evidence in its decision. AR 29, 34, 35 (BTA Decision). Regarding the two appraisal reports, the BTA stated in conclusory fashion that, even if it had admitted them, it would have given them no weight. AR 33-35 (BTA Decision). And yet, BTA determinations must detail "what evidence was persuasive and why,

and which expert was most credible and why." *Boeing*, 102 Wn. App. at 870. Failure to weigh the evidence and articulate its reasons for giving the appraisals no weight constitutes another legal error. The BTA's decision likewise omits any indication that it weighed the evidence of Mr. Zelk's inconsistent appraisals.

B. The BTA ignored or incorrectly interpreted the legal requirement to adjust comparable sales for changes in market conditions.

To derive a value indication from the sales comparison approach, appraisers analyze closed sales, listings, or pending sales of properties similar to the subject property. APPRAISAL INSTITUTE, THE APPRAISAL OF REAL ESTATE 377 (14th ed. 2013). In this analysis, the appraiser must identify elements of comparison and make adjustments to the sale price of each comparable property. *Id.* As discussed below, an essential element of comparison under Washington law and generally accepted appraisal practices is the state of the market at the time of the sale compared to the valuation date of the appraisal. A declining market requires downward adjustments to peak-market sale prices. The BTA, however, accepted peak-market sales from the Assessor with no adjustments for later recessionary market conditions.

1. Washington law requires adjustments for changes in market conditions.

In applying the sales comparison approach, the use of comparable

sales must take into account "the extent to which the sale of a similar property actually represents the general effective market demand for property of such type." RCW 84.40.030(3)(a). Failure to follow statutory valuation criteria such as this constitutes a serious legal error. *Folsom v. County of Spokane*, 111 Wn.2d 256, 270-72, 759 P.2d 1196 (1988). Further, appraisals for property tax purposes must follow the Uniform Standards of Professional Appraisal Practice ("USPAP") promulgated by the Appraisal Standards Board of the Appraisal Foundation. WAC 458-10-060. USPAP requires appraisers to properly recognize when a market is declining. THE APPRAISAL STANDARDS BOARD OF THE APPRAISAL FOUNDATION, UNIFORM STANDARDS OF PROFESSIONAL APPRAISAL PRACTICE (USPAP) F-76 (2012-13 ed.). Furthermore, under USPAP, an appraiser "must not accept an assignment that includes the reporting of predetermined opinions and conclusions." USPAP at U-7.

2. Generally accepted appraisal practices require adjustments to older sales during a declining market.

The Appraisal Institute, an international association of professional real estate appraisers, issues guidance for applying appraisal standards to specific situations. It explains that "A declining market will likely exhibit very little sales activity," thus requiring the appraiser to (a) expand the geographic area for comparable sales and adjust the sales prices for location; (b) "[u]se less recent sales, then adjust for market conditions as

appropriate"; and/or (c) use current listings to "help provide an indication of market conditions and trends." APPRAISAL INSTITUTE, GUIDE NOTES TO THE STANDARDS OF PROFESSIONAL APPRAISAL PRACTICE OF THE APPRAISAL INSTITUTE 41 (2013) (*available at* http://www.appraisalinstitute.org/assets/1/7/AI_Guide_Notes.pdf).

The leading appraisal text explains the need for market conditions adjustments during economic downturns:

> In a depressed economy, recent sales are often difficult to find. Older sales, occurring prior to the onset of the depressed economy, should be used with great caution because they may not reflect the problems associated with the depressed economy. . . .
>
> . . . .
>
> . . . [I]n recent years many property markets saw falling prices, and negative market conditions adjustments were needed in sales comparison analysis involving sales data from that period of market decline.

THE APPRAISAL OF REAL ESTATE, *supra*, at 414-16.

These generally accepted appraisal practices and Washington's statutory valuation criteria (RCW 84.40.030) are in complete accord. Failure to adjust older sales during a declining market is, therefore, a legal error. And yet, the BTA affirmed the Assessor in doing precisely this. The Assessor relied on sales from the peak of the real estate market in 2006 and 2007. AR 998-1000 (Ex. R2-7 to -9), 1024-26 (Ex. R3-7 to -9). He did not adjust the sales prices for market conditions, as though the Great Recession in no way affected the prices at which those properties would

have sold in 2010 and 2011. *Id.*

The BTA accepted this notion of stability on the faulty premise that "quantifiable time adjustments to comparable sales cannot be made with certainty." AR 30 (BTA Decision). This statement is at odds with generally accepted appraisal practices, which recognize "the difficulty of expressing adjustments with mathematical precision" by often using qualitative analysis. THE APPRAISAL OF REAL ESTATE, *supra*, at 403. Making "qualitative conclusions about value trends" is completely acceptable in appraisal practice. *Id.* It is absolutely improper, however, to act as though no change occurred at all simply because mathematical precision is difficult.

The BTA further noted that "trending for market changes is not a significant factor in weighing the parties' sales evidence." AR 30 (BTA Decision). Treating peak-market sales and recessionary sales as equally indicative of value during a declining market runs counter to generally accepted appraisal practices. Older sales should be treated as "less reliable" when "significant changes in market conditions" have occurred: "Older sales, occurring prior to the onset of the depressed economy, should be used with great caution because they may not reflect the problems associated with the depressed economy." THE APPRAISAL OF REAL ESTATE, *supra*, at 383, 415.

In its decision, the BTA accepted the absence of adjustments for

market conditions. It thus implicitly concluded that the market was stable. Accepting no market adjustments, as though the market were stable, is a serious error under standard appraisal theory and Washington law.

3. The BTA accepted an appraisal based on a predetermined, unsupported rejection of time adjustments.

Mr. Zelk based his conclusion of a stable market for this market (during the Great Recession) on a blanket instruction received from his client to make "[n]o market trends (market condition adjustments, time adjustments) . . . to sale prices"—an instruction that Mr. Zelk, in his own words, "adhered to." AR 243-45 (Transcript), 365 (Ex. A13-9). A basic premise of every appraisal is that there is both an appraiser and a client. The client is "the party or parties who engage, by employment or contract, an appraiser in a specific assignment." USPAP at U-2. The Assessor was Mr. Zelk's appraisal client under USPAP. *Id.* at A-108; AR 359 (Ex. A13-3). Mr. Zelk stated in his report that he "adhered" to the Assessor's "guideline" not to make time adjustments. AR 365 (Ex. A13-9). As mentioned above, accepting an assignment that includes a reporting of a predetermined opinion or conclusion is an ethical violation of USPAP, which Washington law has adopted as its governing appraisal standards. Had Saint-Gobain similarly instructed its appraiser, there is no question that it would have fatally undermined the credibility of his appraisal.

4. The Assessor failed to produce evidence that the Assessor cited as an after-the-fact justification for his lack of adjustments for market conditions.

Later, to try to support his lack of time adjustments for pre-recession sales, the Assessor tried to develop additional valuation evidence, including three groupings of sales arranged in a table. AR 997 (Ex. R2-6), 1024 (Ex. R3-7). That table, labeled "Table 6," cited as the source of its data a mysterious "Addendum I" that the Assessor never produced. *Id.*; AR 250 (Transcript). Failure to produce that addendum is a significant breach of the Assessor's duty to make his value determination clear.

Washington law does not allow the Assessor to conceal his valuation process in a black box whose internal workings are secret. Taxpayers have an unqualified right to the factors the assessor used in making the determination of value. *Van Buren v. Miller*, 22 Wn. App. 836, 840, 845, 592 P.2d 671 (1979), *review denied*, 92 Wn.2d 1021 (citing RCW 84.48.150). Missing evidence of valuation raises the issue of spoliation. Washington's leading case on spoliation happens to be a property tax case. In that case, *Pier 67, Inc. v. King County*, the assessor failed to produce records showing how he had appraised properties similar to the one under appeal. The Supreme Court imposed a mandatory inference against the County for that failure:

> [W]here relevant evidence which would properly be a part

> of a case is within the control of a party whose interests it would naturally be to produce it and he fails to do so, without satisfactory explanation, the only inference which the finder of fact may draw is that such evidence would be unfavorable to him.

Pier 67, Inc. v. King County, 89 Wn.2d 379, 385-86, 573 P.2d 2 (1977).

Here, after it became apparent on cross-examination of Mr. Zelk that he had failed to include the source of his data ("Addendum I") in his report and that Table 6 was a source of confusion to the BTA members, the BTA required the Assessor to submit additional evidence after the hearing (with Saint-Gobain having the right to respond). AR 250-56 (Transcript). In so requiring, the BTA rightly characterized the issue to which the missing evidence related (*i.e.*, the absence of adjustments for market conditions, also called "time adjustments") as "an important aspect of this case" and "something as a board we need to address because it's a major issue" between the parties' positions. AR 251 (Transcript). But the Assessor never submitted any "Addendum I" nor mentioned it in his submission—a fact that the BTA did not even acknowledge in its decision. Nor did the BTA draw the mandatory inference against the Assessor as required by *Pier 67* and requested by Saint-Gobain.

What the Assessor submitted in his post-hearing evidence was a list of assorted sales, many of which have a different higher and best use from the subject land; the possibility of developing retail, hotel, or office buildings would increase their land values. AR 305-06 (Ex. A14-1 to -2).

The Assessor's list of sales of dissimilar properties is not a recognized technique for determining market trends. Accepted techniques for determining market trends are to analyze sales and resales of the same properties ("paired sales"), to survey market participants, or to analyze current listings. THE APPRAISAL OF REAL ESTATE, *supra*, at 415-16. Saint-Gobain's appraiser surveyed market participants and found clear evidence of a declining market for properties like the subject land. *See, e.g.*, AR 140-41 (Transcript) ("the brokers all acknowledged that definitely values have declined since late '08"), 309 (Ex. A14-5) (noting that a broker who was involved in one of the pre-recession sales listed on the Assessor's post-hearing submission stated that "if it had sold after 2008, it would have sold for less due to deteriorating economic conditions").

In the end, the BTA sidestepped what it had characterized as a "major issue" entirely, merely finding that adjustments could not be quantified with certainty. AR 30 (BTA Decision). As discussed above, low sales volume is typical of a declining market and does not justify a conclusion that the market is stable. Concluding that a market was stable when it was in fact declining violates Washington law.

5. The BTA failed to decide all the issues before it.

The BTA failed to decide three issues that were before it: the issues raised by (1) unrebutted evidence of Mr. Zelk's adherence to his client's blanket instruction against adjustments for market conditions;

(2) the missing evidence and resulting mandatory inference against the Assessor; and (3) as discussed in Section A above, Saint-Gobain's purposes for presenting the evidence that the BTA excluded and the legal standard for admissibility of that evidence. Each of these issues required resolution. Failing to address these issues is, in each instance, a legal error warranting reversal.

The APA requires the BTA to enter "findings and conclusions, and the reasons and basis therefor, on all material issues of fact, law, or discretion presented on the record." RCW 34.05.461(3). This requirement is to ensure that the BTA "has dealt fully and properly with all the issues in the case before [deciding] it and so that the parties involved and the appellate court may be fully informed as to the bases of [the] decision when it is made." *Weyerhaeuser v. Pierce County*, 124 Wn.2d 26, 35, 873 P.2d 498 (1994) (internal quotation marks and citations omitted) (holding an administrative hearing examiner's findings and conclusions inadequate as a matter of law).

The first two issues directly relate to what the BTA itself called a "major issue" in the case—the issue of adjustments for market conditions. The third relates to showing the County's inconsistent appraisals of the same properties for the same dates. This Court should remand the case to the BTA to decide these material unresolved issues.

C. The BTA ignored or incorrectly interpreted case law, statutory criteria, and its own precedent on treatment of environmental issues.

The subject land and the property most comparable to it both have environmental contamination, but the BTA distinguished the two on the basis of environmental stigma. RCW 84.40.030(3)(a) requires that assessors consider environmental influences on the property. The Washington Supreme Court has held that inconsistent treatment of environmental issues is grounds for reversing the BTA. *Weyerhaeuser Co. v. Easter*, 126 Wn.2d at 382-83. Washington case law and BTA precedent both provide that environmental costs only qualify for a deduction from value when there is "a reasonably certain estimate of the costs of cleanup, including a formal plan and timetable." *Weyerhaeuser Co. v. Easter*, 126 Wn.2d at 384-85. Similarly, USPAP (which binds real estate valuations under Washington law, as discussed above) prohibits appraisal analysis based on a vague notion of environmental stigma: "The analysis of the effects of increased environmental risk and uncertainty on property value (environmental stigma) must be based on market data, rather than unsupported opinion or judgment." USPAP A-20.

The subject land has groundwater contamination. The BTA stated in its decision, "Because the contamination is an ongoing problem coming from another site, the cost-to-cure cannot reasonably be made until the source of the problem is resolved." AR 29-30 (BTA Decision). Despite

having requested and received in discovery Saint-Gobain's environmental report for the subject land, a report that was performed at the request of the Washington Department of Ecology, the Assessor's expert witness professed complete ignorance of the environmental contamination at the subject land. AR 29 (BTA Decision), 84-86, 98-99 (Transcript). Both parties' appraisers treated the subject land as clean, and the BTA agreed with doing so. AR 30 (BTA Decision).

The BTA accorded inconsistent treatment to a comparable property used in appraising the subject land. Of the six comparables relied on in Saint-Gobain's appraisal, the most comparable is the 8th and Othello Terminal, an openly marketed listing located near the subject land. AR 135 (Transcript), 543-52 (Ex. A1-069 to -078), 631-39 (Ex. A2-049 to -057). The listing price indicated a value of $24 per square foot for the nearly 16 acres of land at 8th and Othello Terminal. *Id.* The seller was marketing the property as environmentally clean. AR 140 (Transcript). As part of the transaction, the seller would assume the risk and cost of any cleanup at the site. AR 138 (Transcript).

The County's own appraisal for purposes of determining rent for the land Saint-Gobain leased for the other half of its facility also used the 8th and Othello Terminal listing as a comparable. AR 749 (Ex. A4-045). That appraisal report remarked on the two properties' similarities: "This site is physically the most similar to the subject with large acreage, similar

lot shape, water frontage, and adjacent to East Marginal Way South." AR 753-54 (Ex. A4-049 to -050). The County's appraiser also observed that the listing price for 8th and Othello Terminal is as clean because "[t]he seller plans to pay necessary environmental costs prior to sale." AR 754 (Ex. A4-050). He pointed out that the cleanup costs were still in the process of being determined and had not yet been estimated. AR 752, 754 (Ex. A4-048, -050). As discussed in Section A above, the BTA excluded this evidence as not relevant.

In its conclusions of law, the BTA rejected 8th and Othello Terminal as a comparable as a matter of law. As its basis for doing so, the BTA pointed to "a stigma associated with the required cleanup" of "ongoing environmental issues" at 8th and Othello Terminal. AR 36 (BTA Decision). The decision cites no evidence or legal authority for this conclusion of law.

The BTA's treatment of these two properties is inconsistent. Given that the contamination at 8th and Othello Terminal could be remediated as part of a sale transaction, it was evidently relatively contained and finite. In contrast, the ground-water contamination at the subject land comes from an off-site source and is therefore outside of Saint-Gobain's control to remediate. AR 29-30 (BTA Decision). The BTA has no basis for distinguishing the properties by supposing that a prospective buyer would perceive no risk, uncertainty, or stigma associated with the contamination

at the subject land just because the source is off-site while finding stigma for the more contained situation at 8th and Othello. If anything, an off-site source for which a seller could not assume the risk and costs for cleanup would be more troubling to a buyer.

Saint-Gobain's appraiser and the County's appraiser (for the purpose of determining rent on the land Saint-Gobain leased) both accorded consistent treatment to the properties. Both treated 8th and Othello Terminal as if clean. Both treated the land underlying Saint-Gobain's facility as if clean. These appraisers followed the requirement under Washington law and USPAP to treat environmental influences consistently based only on hard data such as "a reasonably certain estimate of the costs of cleanup, including a formal plan and timetable." No such data existed—not for 8th and Othello Terminal and not for the land underlying Saint-Gobain's facility. As a matter of law, therefore, the BTA should have treated both 8th and Othello Terminal and the subject land consistently by treating both as clean. The BTA's vague notion of "environmental stigma," unsupported by any market data in contravention of USPAP, is not proper grounds for disqualifying a comparable. Rejecting the most comparable property on this basis is a legal error warranting reversal.

D. Case law, statute, regulation, and the BTA's prior holdings required lowering Saint-Gobain's standard of proof to a preponderance of the evidence for both years.

Generally taxpayers must prove the need for a correction to the assessed value by clear, cogent, and convincing evidence. For two reasons, however, the BTA should have judged Saint-Gobain's appeals for both years by a mere preponderance of the evidence.

First, evidence that the Assessor develops after the assessment is judged by a mere preponderance. *Draper Machine Works, Inc. v. Noble*, BTA Docket Nos. 93-149 to 93-151 at pp. 8, 33 (1996) (holding that where the assessor changes valuation factors on appeal, the standard of proof is the preponderance of the evidence for all related issues). Though the Assessor may submit subsequently developed evidence to the BTA, only the Assessor's initial valuation factors are presumed correct and enjoy the protection of a heightened (clear, cogent, and convincing) standard of proof. RCW 84.40.0301. *See also* WAC 458-14-066(2)-(3) (referring to the assessor's furnishing of initial valuation factors and the assessor's subsequent development of additional evidence).

Only after the assessments here did the Assessor develop any evidence attempting to justify his failure to make adjustments for market conditions. He must have developed this evidence later because the Assessor must submit his *initial* valuation factors to the BOE. RCW 84.48.150; WAC 458-14-066(2). The record before the BTA includes all

the evidence taken in connection with the appeal before the BOE. RCW 84.08.130(1); WAC 456-09-010(1)(a). As shown in the BTA's record, the Assessor submitted nothing to the BOE to support the absence of adjustments to his comparable sales for changed market conditions. AR 923-64 (Exs. A10 and A11). In fact, the lack of such adjustments was initially based only on an arbitrary and improper directive from the Assessor to his appraiser, as discussed above. Only later did the Assessor develop his "Table 6" and the missing "Addendum I" to try to justify his predetermined opinion of stable values during the recessionary market. The BTA should have judged that later evidence by a preponderance of the evidence.

The second reason for the lowered evidentiary standard affects all the Assessor's evidence: The Assessor only merits a presumption of correctness if he follows the statutory valuation criteria. *Folsom*, 111 Wn.2d at 270-72. No presumption of correctness or heightened standard of proof applies where the Assessor's valuation is "flawed as a matter of valuation theory—and not merely as a matter of valuation judgment." *Weyerhaeuser Co. v. Ryan*, BTA Docket Nos. 50381 *et seq.*, p. 5 (1997). The Assessor's blanket instruction to his appraisers to make no adjustments for time or market conditions was (1) flawed as a matter of valuation theory; (2) not an exercise of valuation judgment; and (3) contrary to the statutory directive to take into account "the extent to

which the sale of a similar property actually represents the general effective market demand for property of such type." RCW 84.40.030(2). The USPAP rules governing appraiser conduct, discussed above, confirm that the Assessor's blanket instruction and the failure to recognize the declining market were flaws as a matter of both appraisal practices and Washington law.

For these reasons, the BTA should have judged both the 2010 and 2011 appeals by a preponderance standard. In its decision, the BTA agreed that it should judge 2011 by a preponderance of the evidence. But even for the 2011 appeal, the BTA's decision fails to demonstrate any weighing of the evidence to determine which evidence was more persuasive and to articulate the reasons why. *See Boeing*, 102 Wn. App. at 870. Had the BTA properly judged both years by a preponderance, in light of all of the relevant and admissible evidence, it would have found that Saint-Gobain's evidence more persuasively proved the market value of the subject land.

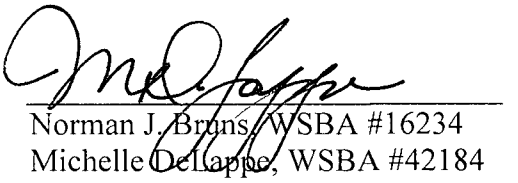
VI. CONCLUSION

Saint-Gobain asks this Court to set aside the BTA's decision with respect to assessment years 2010 and 2011 and to remand these appeals to the BTA for further proceedings to decide all the issues before it and to issue its decision in accordance with Washington law and all the admissible evidence in the record. Saint-Gobain further requests an order

for costs allowable under RCW 34.05.566(5)(b) and such other relief as this Court deems appropriate.

RESPECTFULLY SUBMITTED this 12th day of February, 2015.

GARVEY SCHUBERT BARER



Norman J. Bruns, WSBA #16234
Michelle DeLappe, WSBA #42184

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on February 12, 2015, I caused the foregoing document to be served on the person identified below via messenger delivery:

Michael J. Sinsky, WSBA #19073
Office of the Prosecuting Attorney
516 Third Avenue, W400
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Attorney for: Respondent

DATED AT SEATTLE, WASHINGTON this 12th day of February, 2015.

Miriam Green
Legal Assistant to Norman J. Bruns
and Michelle DeLappe